IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2008 Session

GEORGE A. KELLER v. LISA L. KELLER

Appeal from the Circuit Court for Montgomery County
No. 50400528 Ross H. Hicks, Judge

No. M2008-00399-COA-R3-CV - Filed May 20, 2009

Father filed a petition to modify the divorce decree, alleging that there had been a material change of circumstances such that the court should modify the parenting plan to make him the primary residential parent of the parties' child. The trial court found no material change of circumstances. Father appealed. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Patricia A. Rust, Clarksville, Tennessee, for the appellant, George August Keller.

Gary J. Hodges, Clarksville, Tennessee, for the appellee, Lisa L. Keller.

OPINION

George Keller ("Father") and Lisa Keller ("Mother") were divorced in February 2005. The couple had one child, a daughter, who was three at the time of the divorce. The parenting plan provided that the parents would alternate weeks with the child. Father lived in Montgomery County. Mother lived in Stewart County. The plan did not provide for what would happen when the child reached school age. Father and Mother, however, had a verbal agreement that, when the child reached school age, she would go to school in Stewart County and Father would move to Stewart County after selling his home in Montgomery County.

In June 2006, Father filed a petition to modify the divorce decree, alleging that there had been a material change of circumstances such that the court should modify the parenting plan by making him the primary residential parent. The petition also maintained that Mother had not

executed the documents necessary to transfer $20,000.00 from her 401K account to Father's 401K account as required by the divorce decree.[1]

In July 2006, the parents filed competing motions regarding the child's school attendance. Father filed a motion to enroll the child in the Montgomery County school system. Mother filed a motion to enroll the child in the Stewart County school system. Mediation was unsuccessful, and a hearing was held August 17, 2006. The trial court found that the child should be enrolled in Ringgold Elementary School in Montgomery County and the school-age services program at Ft. Campbell, Kentucky.[2]

Another hearing was held August 10, 2007, on competing motions concerning which school the child should attend. The trial court ordered that the child be enrolled in Stewart County. A final hearing was held December 11, 2007, on Father's original petition to modify the divorce decree. After hearing Father's proof and Mother's testimony, the trial court denied Father's petition to modify the divorce decree, finding no material change in circumstances. Father appealed.

Standard of Review

Our review is de novo upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R.App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Because children thrive in stable environments, existing custody arrangements are favored. *See Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996) (citing *Taylor v. Taylor*, 849 S.W.2d 319, 328 (Tenn. 1993)); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). Once made and implemented, a custody decision is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, our Supreme Court has held that a "trial court may modify an award of child custody when both a material change of circumstances has occurred and a change of custody is in the child's best interests." *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). The Court discussed factors relevant to the material change of circumstances determination:

> As explained in Blair, the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 150. While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her

[1]The 401K issue is not a part of this appeal.

[2]Both parents worked at Ft. Campbell. The parent in possession of the child would take her to the Child Development Center, from which the child would be transported to school.

> custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id.*

Kendrick, 90 S.W.3d at 570 (quoting *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). *See also* Tenn.Code Ann. § 36-6-101(a)(2)(B).[3]

If a material change in circumstances has been proven, "it must then be determined whether the modification is in the child's best interests ... according to the factors enumerated in Tennessee Code Annotated section 36-6-106." *Kendrick*, 90 S.W.3d at 570 (footnote omitted). If no material change in circumstances has been proven, the trial court "is not required to make a best interests determination and must deny the request for a change of custody." *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999).

Material Change of Circumstances

Father maintains several material changes in circumstances have occurred since the divorce decree. First, he argues that he is unable to move to Stewart County in accordance with the verbal agreement. Since the divorce, Mother, who has not refinanced her home to take Father off the mortgage, has been late making a number of mortgage payments. Consequently, Father has a credit report that inhibits his ability to qualify for a loan. Without a loan, Father alleges, he cannot move to Stewart County. Inability to make the move from Montgomery County to Stewart County may indeed be a change that was not known or reasonably anticipated when the Kellers divorced. It appears to affect the child's well-being because she cannot have Father as involved in her school as he was when she attended school in Montgomery County. Father's own testimony, however, undermines his argument. He was asked by his counsel, "if you currently sold your house here in Montgomery County, would you still be able to qualify for a loan to purchase another house in Stewart County?" He replied: "Probably only if I use my VA loan." His statement was not explained further. Consequently, it appears to this court that Father believes he can secure a loan to purchase a home in Stewart County in spite of whatever obstacles Mother has created by her late mortgage payments. Thus, Father's first argument is without merit since the evidence does not preponderate against the trial court's conclusion that it was Father's decision not to move back to Stewart County.

Second, Father argues that there is a material change in circumstances because of Mother's drinking and lack of care for the child. He supports this argument with the testimony

[3]Tenn. Code Ann. § 36-6-101(a)(2)(B) states:

> If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

of Sharon Anderson, Mother's former neighbor. Anderson testified that she saw Mother drinking early in the mornings while Mother was pregnant,[4] observed the child running around the neighborhood unsupervised and heard Mother yell at the child to get away from her. These events occurred about two years before the hearing. The trial court made no mention of these events in its ruling, and we do not disagree with the judge's apparent disregard of distant happenings.

Father also argues that the child's behavioral problems constitute a material change of circumstances.[5] He took the child to a psychologist, Dr. Janice Martin, because of "[h]er disruptive behavior. It would take normally two or three days to get her calmed down from when she came back from her mother's house." Father described the child's behavior as "[j]ust running around, being silly. Just trying to push buttons to see what would get me angry. And then she would run around naked and pulling a towel between her legs, and all kinds of just disruptive behavior that shouldn't be done."

Dr. Martin testified that "there's a lot of chaos in her environment. There's a lot of fear. There's a lot of anger. There's a lot of abandonment issues that she doesn't want to address." When she drew her family, the child did not draw her mother. She "would not disclose anything about her mother or her mother's house." While the move to the new school in Stewart County was "not terribly disruptive," Dr. Martin stated:

> She doesn't feel like she has as close a link to her parents. Because at Ringgold, Mom and Dad could be there in ten minutes if she needed them. At the other school, you know, it's going to take about - - a long, long time, according to Danielle . . . I believe she feels safer knowing that they can get [there] quick.

Dr. Martin further testified that the child was "more psychologically close to her mother than her dad," but there were "some maladaptive issues in that bond." Dr. Martin's diagnosis at the time of the hearing was that the child "still carries a very benign diagnosis of adjustment disorder mixed with conduct." When asked for her recommendations regarding the child, Dr. Martin stated:

> Right now I recommend a full custody evaluation, that she go back into the SAS program so that cuts out a little bit of the angst in her life. I recommend that her father goes into therapy with her and that her mother goes into therapy with her, that Dad take parenting classes, that Mom take parenting classes. And I think their divorce happened before they [parenting classes] were mandatory . . . And

[4]Mother had a child with her current husband. The child later died. The record does not disclose the cause of the infant's death.

[5]We note that the child's behavioral problems were not alleged in the petition as grounds to find a material change in circumstances. The trial court did not discuss the child's behavior but implicitly rejected the behavior issues as grounds by finding no material change in circumstances. Since the trial court heard the testimony of Dr. Janice Martin without objection from Mother's counsel, we view the issue has having been tried with the consent of the parties. Tenn. R. Civ. P. 15.02.

> that Mom take anger management classes. That would be my recommendation right now. It doesn't hurt anybody. I would have no problem with Dad taking anger management classes, too.

Mother's attorney cross-examined Dr. Martin but put on no expert proof to contradict Dr. Martin's testimony. The trial court erred in ignoring Dr. Martin's testimony in its ruling. In our opinion, the evidence preponderates against the trial court's finding of no material change of circumstances. Based on Dr. Martin's testimony, Father has presented evidence that the child's change in behavior has materially affected her well-being.

We find by a preponderance of the evidence that there has been a material change in circumstances and reverse the trial court's decision to the contrary. The case is remanded to the trial court for a best interest determination pursuant to Tenn. Code Ann. § 36-6-106.

Costs of appeal are assessed against the appellee, Lisa Keller, for which execution may issue, if necessary.

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ANDY D. BENNETT, JUDGE